FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

BRIAN FREDERICK LOWREY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTION PRESENTED

1. Whether, under 21 U.S.C. section 841 and U.S.S.G. section 2D1.1(c), the quantity of marijuana attributable to a defendant for sentencing purposes should be calculated based upon an estimated number of marijuana plants or upon the dry weight of the harvested and processed marijuana where the defendant is arrested after all harvesting takes place and no plants are seized.

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PETITION FOR WRIT OF CERTIORARI

Brian Frederick Lowery (Mr. Lowery), Petitioner, respectfully prays for a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above-referenced matter on July 3, 1996.

OPINIONS BELOW

The unpublished opinion of the Eleventh Circuit Court of Appeals is reproduced in the Appendix hereto (App. 1a).

JURISDICTION

Mr. Lowery's petition seeks review of the judgment of the Court of Appeals entered on July 3, 1996. (App. 1a). This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. section 1254(1). This petition presents this Court with a conflict among the Circuit Courts of Appeals that materially effects a determination made in the present case. The conflict arises over whether a defendant's sentence should be calculated based upon an estimated number of marijuana plants or upon the dry weight of the harvested marijuana where the defendant is arrested after the marijuana is harvested and no plants are seized.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of U.S.S.G. 2D1.1(c) and Title 21 U.S.C. § 841 are set forth in the appendix. (App. 11a, 12a, 13a).

STATEMENT

A. PROCEDURAL HISTORY

Brian Lowery was sentenced by the United States District Court for the Middle District of Florida to One Hundred and Twenty (120) Months in prison, pursuant to Title 21 U.S.C. section 841 and U.S.S.G. section 2D1.1(c) n* (Nov. 1992), after he was convicted of Title 21 U.S.C. § 846, conspiracy to possess with the intent to distribute marijuana and marijuana plants. (App. 3a) Mr. Lowery appealed his criminal conviction to the Eleventh Circuit Court of Appeals. Among the issues presented in his appeal, Mr. Lowery argued that the district court clearly erred and misapplied sentencing guideline provisions in finding that his offense involved 1,800 marijuana plants. (App. 2a) Specifically, Brian Lowery argued that the district court clearly erred in sentencing him by calculating his sentence in terms of an estimated number of marijuana plants attributable to him, rather than the dry weight of the marijuana because no marijuana plants attributable to Mr. Lowery were seized.

The Eleventh Circuit Court of Appeals, in an unpublished, per curiam opinion, briefly addressed Brian Lowery's argument that the district court misapplied U.S.S.G. § 2D1.1(c) n.* (Nov. 1992) in calculating the

amount of drugs attributable to him for sentencing purposes. (App. 2a). The appellate court held that, under the recent en banc decision of *United States v. Shields*, 87 F.3d 1194 (11th Cir. 1996), Mr. Lowery was foreclosed from arguing that his sentence should have been calculated on the weight of marijuana involved in his offense rather than the number of plants because no marijuana plants attributable to Mr. Lowery were seized. (App. 2a). Mr. Lowery now petitions this Court for a writ of certiorari to decide this issue because of conflict among the Circuit Courts.

B. FACTS

On March 3, 1993, twenty-seven (27) year old Brian Lowery and his father were indicted of conspiring to possess with intent to distribute marijuana and marijuana plants. (R1-25-1). The original indictment included only James Lowery, Brian's father. (R1-101-2). However, the Government sought to obtain James Lowery's assistance in implicating Baker County Sheriff, Joe Newmans in the alleged drug conspiracy. (R1-101-3). The Government threatened James Lowery that they would indict his son Brian if he refused to implicate Sheriff Newmans. (R1-101-3). The older Lowery refused to cooperate and the Government obtained a superseding indictment against both Brian and James Lowery. (R6-105, 108, 113).

The government's case against Brian Lowery was based solely on the testimony of three alleged co-conspirators. These witnesses, all members of the Crews family, testified against Brian Lowery as part of the terms of plea agreements entered into with the Government and in

exchange for more lenient treatment in their own criminal cases, including reduced sentences and lesser forfeiture of their and their family's assets. (R4-49, 50).

The Crews' own criminal drug indictments resulted from a 1992 DEA and FDLE raid of the Crews family homestead. (R4-126). During the raid, processed marijuana, large amounts of cash, vehicles, equipment and drug paraphernalia were seized. (R4-126-127). After initially defending themselves against the Government's indictments, each of the Crews Defendants eventually decided to cooperate with the Government and entered into plea agreements. (R4-152). The Crews' plea agreements each contained specific language in which the Crewses and the Government agreed that the total amount of readily provable marijuana for which each Crews was foreseeably responsible during the entire duration of the conspiracy was between **One Hundred (100) and Four Hundred (400) kilograms.** (R5-59) (emphasis added).

In 1979, two of the Crewses, brothers Kenneth and James, began planting, harvesting and selling marijuana to supplement their incomes. (R4-52). In 1984, the Crews enterprise was expanded to include Brian's father, James Lowery and local Baker County Sheriff, Joe Newmans. (R5-188). The four men, James and Kenneth Crews, James Lowery and Joe Newmans, participated in the marijuana growing and distribution operation from 1984 to 1989. (R5-191).

In 1988, James Crews' son, Darrell began to help in the operation. (R5-197). In 1989, Brian Lowery was recruited by his father, James Lowery, because the older

Lowery was not pulling his weight and the Crews wanted to cut him out of the business. (R5-199). Beginning in 1990, Darrell Crews and Brian Lowery were made official partners and were to receive a cut of the profits. (R5-69; R5-199, 265; R6-66-68). Despite the new arrangement, the Crews began a second, separate marijuana growing and distribution operation, exclusive of the Lowerys. (R5-200).

James Crews, the record keeper for the operation, testified to the records of profits for those in the conspiracy in terms of pounds of marijuana and the profits from the sale of those pounds. (R4-77-78). James Crews testified that Brian Lowery entered into the four-way conspiracy five (5) years after it began and never served in any capacity as a leader, supervisor, or decision maker. (R5-64). According to James and Darrell Crews, Brian's involvement was limited to assisting in the preparation of the beds and the harvesting of the plants. (R4-71; R6-70). According to Darrell Crews, Brian Lowery's profits from the operation were less than those that Darrell made during the same time period. (R6-73).

At sentencing, the district court attributed 1800 marijuana plants to Brian Lowery, for a base offense level of 32, based on the equivalency provision in U.S.S.G. § 2D1.1(c)n*. (SR-55). The District Court adjusted the base offense level downward two levels for Brian Lowery's minimal role in the offense and then sentenced Mr. Lowery under the mandatory minimum provided for in Title 21 U.S.C. § 841. (SR-37, 55). The district court's calculations resulted in a sentence for Brian Lowery, then 28 years old, of One Hundred and Twenty (120) Months in prison. (SR-55; App 2a).

Mr. Lowery appealed his conviction to the Eleventh Circuit Court of Appeals. The Eleventh Circuit affirmed the district court's judgment and sentence in an unpublished, per curiam opinion. (App 1a). Brian Lowery now petitions this Court to issue a Writ of Certiorari to the Eleventh Circuit based upon a conflict among the Circuit Courts of Appeals as to whether a defendant's sentence should be calculated based upon an estimated number of marijuana plants or the dry weight of the marijuana where the marijuana has been harvested and no marijuana plants attributable to the defendant have been seized.

REASONS FOR GRANTING THE PETITION

The Court should grant the writ of certiorari because the question raised by this case involves a conflict among the Circuit Courts of Appeals. Further, the issue presented here is a recurring question in the Circuit Courts greatly affecting the nature and extent of criminal punishment imposed upon drug defendants convicted in conspiracies involving marijuana.

The Eleventh Circuit Court of Appeals decided against Brian Lowery on the issue of whether his sentence should be calculated using an estimate of marijuana plants or the dry weight of the harvested marijuana attributable to him based on its recent *en banc* decision in *United States v. Shields*, 87 F.3d 1194 (11th Cir. 1996). The *Shields en banc* Court held that "where there is sufficient evidence that the relevant conduct for a defendant

involves growing marijuana plants, the equivalency provision of U.S.S.G. § 2D1.1 applies, and the offense level is calculated using the number of plants". *Shields*, 87 F.3d at 1197.

This holding marks a complete departure from the Eleventh Circuit's previous rulings on this issue. In the earlier *Shields* case, *United States v. Shields*, 49 F.3d 707 (11th Cir. 1995), the Eleventh Circuit panel decided that established case law for this Circuit contemplated "the use of actual post-harvest weight of consumable marijuana, rather than presumed weight derived from the number of harvested plants" for sentencing purposes in both conspiracy to manufacture and conspiracy to possess cases. *Shields*, 49 F.3d 707, 712 (11th Cir. 1995) (relying on *United States v. Osburne*, 955 F.2d 1500 (11th Cir.), *cert. denied*, ___ U.S. ___, ___, 113 S.Ct. 223, 290, 121 L.Ed.2d 160, 215 (1992); and *United States v. Bradley*, 905 F.2d 359 (11th Cir. 1990)). The earlier *Shields* opinion was in accord with decisions of the Second and Sixth Circuit Courts of Appeals, as noted by the *Shields* panel. *Shields*, 49 F.3d at 712 n. 18 (citing *United States v. Stevens*, 25 F.3d 318, 321-23 (6th Cir. 1994); and *United States v. Blume*, 967 F.2d 45, 49 (2nd Cir. 1992)). Accordingly, when the Eleventh Circuit, sitting en banc, reversed itself on this issue, the Circuit aligned itself with the Seventh, Eighth and Ninth Circuits and against the Second and the Sixth Circuits. *Shields*, 87 F.3d at 1197 (relying on *United States v. Wilson*, 49 F.3d 406, 410 (8th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 384, 133 L.Ed.2d 306 (1995); *United States v. Wegner*, 46 F.3d 924, 928 (9th Cir. 1995); and *United States v. Haynes*, 969 F.2d 569, 571-72 (7th Cir. 1992)).

The nub of the conflict between the Circuits stems from the fact that Congress has chosen to distinguish between marijuana plants and harvested marijuana for sentencing purposes. Pursuant to U.S.S.G. § 2D1.1(c), processed marijuana is to be measured by weight but plants are to be counted by number and then treated as the equivalent of an amount of dry marijuana as set by statute.[1] The split arises because the Second and Sixth Circuits hold that the enhanced punishment reflected in U.S.S.G. § 2D1.1(c)'s equivalency provision applies only to defendants in cases where live plants are found or seized, while the Seventh, Eighth, Ninth, and now, Eleventh Circuits hold that the equivalency ratio should be applied to defendants in cases involving both harvested and live marijuana plants. At least one other Circuit has acknowledged the Circuit split and declined to address the issue. *United States v. Heater*, 63 F.3d 311, 322-23 and n.2 (4th Cir. 1995).

As noted above, earlier decisions of the Eleventh Circuit held that the enhanced punishment under § 2D1.1(c) applied only to live plants actually found and attributable to the defendant. *United States v. Osburne*, 955 F.2d 1500 (11th Cir.), *cert. denied*, ___ U.S. ___, ___, 113 S.Ct. 223, 290, 121 L.Ed.2d 160, 215 (1992); and *United*

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[1] Under the Sentencing Guidelines in effect since November 1, 1995, each marijuana plant is treated as the equivalent of 100 grams of dry marijuana, unless the actual weight is greater. U.S.S.G. § 2D1.1(c), n(E) & comment. (1995). Prior to the 1995 amendments, each plant was treated as the equivalent of one kilogram of dry marijuana, as long as the offense involved fifty or more plants. U.S.S.G. § 2D1.1(c), n* & comment. (1992).

States v. Bradley, 905 F.2d 359 (11th Cir. 1990). Similarly, the Sixth Circuit Court of Appeals holds that where a defendant is charged with conspiracy to possess with intent to distribute marijuana, the defendant's sentence should not be computed based on the stepped up sentencing guideline equivalency provision for marijuana plants when the marijuana has already been harvested. *United States v. Stevens*, 25 F.3d 318, 323 (2nd Cir. 1994). The Sixth Circuit, in deciding *Stevens*, reviewed the history of amendments to the United States Sentencing Guidelines drug quantity table and noted that the important point emerging from this history is that Congress and the Sentencing Guidelines Commission have consistently provided that *harvested marijuana* was to be measured by *weight*. *Stevens*, 25 F.3d at 322-23 (emphasis added).[2] Likewise, the Second Circuit Court of Appeals found that measuring live marijuana by number of plants and dry leaf marijuana by weight "best comports with congressional intent in passing its mandatory sentencing provision, 21 U.S.C. § 841(b)(1)(B)(vii) and with the rationale for the corresponding sentencing guideline, U.S.S.G. § 2D1.1." *United States v. Blume*, 967 F.2d 45, 49 (2nd Cir. 1992).

By contrast, the Seventh Circuit views Congress' intent as to the application of U.S.S.G. § 2D1.1(c) in direct

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[2] However, the Sixth Circuit does distinguish between defendants who have been convicted of conspiracy to possess with intent to distribute versus defendants who are convicted of manufacturing on this issue, further adding to the confusion engendered by the split between the Circuits as to the application of the equivalency provision. *United States v. Oliver*, 90 F.3d 177, 179 (6th Cir. 1996).

contradiction to the Sixth and the Second Circuit's views. *United States v. Haynes*, 969 F.3d 569, 572 (7th Cir. 1992). Likewise, the Eighth and Ninth Circuits have relied on those Circuit's interpretation of congressional intent in determining that the conversion ratio contemplated by § 2D1.1(c) should be applied in sentencing regardless of whether live plants are found or plants have already been processed and harvested. *United States v. Wegner*, 46 F.3d 924, 928 (9th Cir. 1995); *United States v. Wilson*, 49 F.3d 406, 410 (8th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 384, 133 L.Ed.2d 206 (1995). Accordingly, both sides of the Circuit split point to the same rationale for their conflicting decisions on this issue, Congress' and the Sentencing Commission's intent in promulgating Title 21 U.S.C. § 841 and U.S.S.G. § 2D1.1(c).

The difference between applying the equivalency provision or simply sentencing a defendant based upon dry weight of marijuana is quite dramatic. The *Haynes* court conceded that the disparity in sentencing Haynes under the equivalency provision rather than using harvested marijuana weight was "indeed glaring". *Haynes*, 969 F.2d at 573. Both the Second and the Sixth Circuits point to the significant differences resulting from use of the equivalency provision as a reason for their decisions to use harvested marijuana weight, and not the plant equivalency provision, where no plants are seized. *Stevens*, 25 F.3d at 323; *Blume*, 967 F.2d at 50.

The disparity is best explained by viewing an individual case. For example, had Brian Lowery been sentenced based upon the total weight of the marijuana produced during the entire thirteen year conspiracy, a conspiracy that Mr. Lowery was actually involved in for

only the last three or four years, he would have been sentenced based on an amount of marijuana attributable to him of between 100 and 400 kilograms. This is the quantity of marijuana that each of the Crews *and* the Government *agreed* was produced during the *entire* thirteen year conspiracy. (R5-59) (emphasis added).[3]

Using the 100 to 400 kilogram figure in sentencing Brian Lowery, instead of an estimated number of plants and then the equivalency conversion used by the district court, would have resulted in Mr. Lowery being sentenced to a base offense level of 26 instead of a base offense level of 32. Subtracting the two level adjustment the district court made for minor participation and using Criminal History Category I because Brian Lowery had not committed any prior criminal offenses, Mr. Lowery would have been sentenced to between fifty-one to sixty-three (51-63) months in prison rather than 120 months. U.S.S.G. § 2D1.1(c); U.S.S.G. § 5 Sentencing Table.

The Circuit split and the resulting disparity in sentences for defendants sentenced in the Second and Sixth Circuits, from those sentenced in the other Circuits must be rectified. One of the purposes of the United States Sentencing Guidelines is to bring reasonable uniformity to sentencing. U.S.S.G. Introduction, Policy Statement. This promise has been twisted by two diametrically opposed interpretations of the equivalency provision in § 2D1.1(c).

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[3] Certainly, this is the largest amount of marijuana for which Brian Lowery, who only participated in the conspiracy for the last few years, should be held responsible.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review and reverse the judgment below. Because this is an important issue of law that affects the nature and extent of criminal punishment imposed upon Petitioner, Brian Lowery and other criminal defendants, this Court should settle the law as to this issue so as to prevent disparity in sentencing and other injustices. Accordingly, the Petitioner respectfully requests this Court grant the Petition of Writ of Certiorari and to require briefs on the merits and oral argument in this cause.

Respectfully submitted,

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DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-3022

D. C. Docket No. 93-21-(SI)-CR-J-16

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BRIAN FREDERICK LOWERY,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(Filed July 3, 1996)

Before COX, Circuit Judge, RONEY and WOOD*, Senior Circuit Judges.

PER CURIAM:

Brian Frederick Lowery was convicted following a jury trial for conspiracy to distribute and to possess with

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* Honorable Harlington Wood, Jr., Senior U. S. Circuit Judge for the Seventh Circuit, sitting by designation.

intent to distribute marijuana, in violation of 21 U.S.C. § 846. Lowery appeals his conviction and 120-month sentence.

Lowery attacks his conviction and sentence, contending that the district court: (1) erred in denying his motion to dismiss for prosecutorial vindictiveness and misconduct, (2) abused its discretion in limiting his right to cross-examine government witnesses, (3) clearly erred in finding that his offense involved 1,800 marijuana plants, and (4) misapplied the equivalency provision of U.S.S.G. § 2D1.1(c) n*. *See* United States Sentencing Commission, *Guidelines Manual,* § 2D1.1(c) n.* (Nov. 1992). After reviewing the record, we conclude that Lowery's first three contentions are meritless and do not warrant discussion. *See* 11th Cir. R. 36-1.

Lowery's fourth contention also lacks merit. Lowery argues that his sentence should be based on the weight of the marijuana rather than the number of marijuana plants involved in his offense because law enforcement officers did not seize plants when they intervened with this conspiracy. This argument is foreclosed by our decision in *United States v. Shields,* 11th Cir., 1986, ___ F.3d ___ (No. 93-9270, June 19, 1996) (en banc).

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE District of FLORIDA

UNITED STATES OF AMERICA

V.

BRIAN FREDERICK LOWERY
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
93-21(S1)-Cr-J-16

Bennie Lazzara, Jr., Esq.
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[X] was found guilty on count(s) One of the Indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section
21 U.S.C. 846

Nature of Offense
Conspiracy to possess with intent to distribute marijuana and marijuana plants.

Date Offense Concluded
1992

Count Number(s)
One

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $ 50.00 , for count(s) One , which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 264-95-3062

Defendant's Date of Birth: July 10, 1965

Defendant's Mailing Address:
Route 1, Box 285-10
Macclenny, FL 32063

Defendant's Residence Address:
Route 1, Box 285-10
Macclenny, FL 32063

August 25, 1993
Date of Imposition of Sentence

/s/ Harvey E. Schlesinger
Signature of Judicial Officer

HARVEY E. SCHLESINGER,
U.S. District Judge
Name & Title of Judicial Officer

August 27, 1993
Date

Defendant: BRIAN FREDERICK LOWERY
Case Number: 93-21(S1)-Cr-J-16

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **120 MONTHS** .

[X] The court makes the following recommendations to the Bureau of Prisons: Federal Prison Camp, Jesep, GA or in Northwest Florida.

[X] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district.

[ ] at ____ a.m. / p.m. on _____.
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[ ] before 2 p.m. on _____.
[ ] as notified by the United States marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance, and shall not possess a firearm or destructive device. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[ ] Defendant shall participate in the Home Detention program for a period of ___ days. During this time, defendant will remain at defendant's place of residence except for employment and other activities approved in advance by defendant's Probation Officer. Defendant will be subject to the standard conditions of Home Detention adopted for use in the Middle District of Florida, which may include the requirement to wear an electronic monitoring device and to follow electronic monitoring procedures specified by the Probation Officer.

Defendant shall provide the Probation Office with any requested financial information.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirements.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): The Court finds that the defendant qualifies for a minor role adjustment for a 2 level reduction of the offense level.

Guideline Range Determined by the Court:

Total Offense Level: 30

Criminal History Category: 1

Imprisonment Range: 120 to 121 months

Supervised Release Range: 5 years

Fine Range: $ 15,000.00 to $ 4,000,000.00

[X] Fine is waived or is below the guideline range because of the defendant's inability to pay.

Restitution: $ N/A

[ ] Full restitution is not ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

U.S.S.G. § 2D1.1(C) n* (1992).

In the case of an offense involving marihuana plants, if the offense involved (A) 50 or more marihuana plants, treat each plant as equivalent to 1 KG of marihuana; (B) fewer than 50 marihuana plants, treat each plant as equivalent to 100 G of marihuana. *Provided*, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

U.S.S.G. § 2D1.1(c) n*(E) (1995).

In the case of an offense involving marihuana plants, treat each plant, regardless of sex, as equivalent to 100 G of marihuana. *Provided,* however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

21 U.S.C. § 841 (1996)

§ 841. Prohibited acts A

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance; or . . .

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) or this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving – . . .

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or . . .

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . .

Supreme Court, U.S.
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No. 96-483

In the Supreme Court of the United States

OCTOBER TERM, 1996

BRIAN FREDERICK LOWERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether the district court correctly sentenced petitioner to the ten-year mandatory minimum term of imprisonment required by 21 U.S.C. 841(b)(1)(A)(vii) for drug trafficking offenses involving 1000 or more marijuana plants, based on evidence that petitioner helped plant and cultivate more than 1000 marijuana plants.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 91 F.3d 161 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1996. The petition for a writ of certiorari was filed on September 25, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conspiring to distribute marijuana and to possess marijuana with intent to

distribute it, in violation of 21 U.S.C. 846. He was sentenced to 120 months' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed. Pet. App. 1a-2a.

1. Beginning in the late 1980s, petitioner was actively engaged with a group of people, including his father, Jimmie Lowery, in the cultivation of marijuana plants. James Crews and his brother, Kenneth Crews, had been growing and distributing marijuana for a number of years when, in 1985, Jimmie Lowery and Joe Newmans, the local sheriff, joined forces with the Crews brothers. In 1988 or 1989, petitioner became involved in the operation. His role was limited to the cultivation side of the business. He helped prepare the ground for planting, built beds in which to plant the marijuana, and helped plant and fertilize the marijuana. He also helped harvest the marijuana plants from the patches, and picked the marijuana leaves off the plants once they were transported to the Crews' farm. In 1989 or 1990, petitioner was brought into the group as a full partner. Gov't C.A. Br. 8-10, 33.

2. In determining the amount of drugs attributable to petitioner for purposes of preparing the presentence report (PSR), the Probation Office relied on a footnote to the Drug Quantity Table, Sentencing Guidelines § 2D1.1(c) n.*, which, at the time of petitioner's sentencing, provided that, for offenses involving 50 or more marijuana plants, each plant should be treated as the equivalent of one kilogram of marijuana.[1] Based on that one-plant/one-kilogram

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[1] Section 2D1.1(c) n.* (1993) provided in part:

In the case of an offense involving marihuana plants, if the offense involved (A) 50 or more marihuana plants, treat

equivalency, the PSR assigned petitioner a base offense level of 32, the level for marijuana trafficking offenses involving at least 1000 but no more than 3000 kilograms of marijuana. The PSR also concluded that petitioner was subject to a mandatory minimum of ten years' imprisonment under 21 U.S.C. 841(b)(1)(A)(vii), because his offense involved at least 1000 marijuana plants. PSR 3, 7.[2]

3. The district court largely adopted the findings of the PSR. It found by a preponderance of the evidence that in each of the years 1989, 1990, and 1991 petitioner was involved in the cultivation of 600 marijuana plants. It then applied the Guidelines' equivalency provision to convert the 1800 plants attributable to petitioner to 1800 kilograms of marijuana for purposes of applying the Drug Quantity Table, which corresponded to a base offense level of 32. With a two-level reduction because of petitioner's minimal role in the offense, petitioner's total offense level was 30, which resulted in a sentencing range at

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> each plant as equivalent to 1 KG of marihuana; (B) fewer than 50 marihuana plants, treat each plant as equivalent to 100 G of marihuana. *Provided*, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

The Sentencing Commission amended that provision in November 1995 to eliminate the higher equivalency ratio for offenses involving 50 or more plants. Guidelines App. C, Amend. 516. The current version of the Guidelines provides for a uniform equivalency ratio of 100 grams of marijuana per plant. Guidelines § 2D1.1(c) n.* (1996).

[2] Section 841(b)(1)(A)(vii) provides that any person who commits a "violation of [Section 841(a)] involving * * * 1000 kilograms or more of * * * marihuana, or 1,000 or more marihuana plants regardless of weight * * * shall be sentenced to a term of imprisonment which may not be less than 10 years."

criminal history category I of 97-to-121 months' imprisonment. Because the statutory ten-year mandatory minimum sentence applied, however, petitioner's effective Guidelines sentencing range was 120-to-121 months. The district court sentenced petitioner to 120 months' imprisonment. Gov't C.A. Br. 7-8, 33-34; PSR 3, 7.

4. The court of appeals affirmed. Pet. App. 1a-2a. It rejected petitioner's contention that, because no live marijuana plants attributable to him were seized by law enforcement officers, his sentence should have been calculated under Guidelines § 2D1.1(c) n.* based on the weight of the processed marijuana obtained from the plants. Pet. App. 2a.[3] The court concluded (*ibid.*) that petitioner's argument was foreclosed by its recent en banc decision in *United States* v. *Shields*, 87 F.3d 1194 (11th Cir. 1996), in which it had held that the government need not seize live plants in order to hold a defendant accountable for possessing marijuana plants within the meaning of Guidelines § 2D1.1(c) n.*. The court in *Shields* explained that "[n]othing in the text of § 2D1.1 or § 841(b) suggests that their application depends upon whether the marijuana plants are harvested before or after authorities apprehend the grower." *Shields*, 87 F.3d at 1197.

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[3] The court also rejected petitioner's arguments that the district court erred (i) in denying his motion to dismiss for prosecutorial misconduct, (ii) limiting his right to cross-examine government witnesses, and (iii) finding that the number of marijuana plants involved in his offense totalled 1800. Pet. App. 2a. Petitioner does not contest those rulings.

ARGUMENT

Petitioner argues (Pet. 6-11) that the district court misapplied the equivalency provision of 21 U.S.C. 841 and Guidelines § 2D1.1(c) n.* in computing his sentencing range based on the number of marijuana plants attributable to him, rather than on the dry weight of the processed marijuana, because (Pet. i) he was "arrested after all harvesting t[ook] place and no plants [we]re seized."

1. There is no reason for this Court to consider petitioner's claim that the district court erred in applying the one-plant/one-kilogram ratio under Sentencing Guidelines § 2D1.1(c) n.*. Because petitioner received the minimum sentence permitted by the statute, any error in the district court's application of the Sentencing Guidelines would have been harmless. See *United States* v. *Silvers*, 84 F.3d 1317, 1326 (10th Cir. 1996), petition for cert. pending, No. 96-6225 (Oct. 4, 1996). Although petitioner now contends that the district court also misapplied the statute's one-plant/one-kilogram equivalency provision, that argument is not properly before this Court, because petitioner failed to raise it in the court of appeals, and the court of appeals did not otherwise consider it. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

2. In any event, even if petitioner had preserved his statutory argument, it is without merit. Section 841(b)(1)(A)(vii) provides that any person who commits a "violation of [Section 841(a)] involving * * * 1000 kilograms or more of * * * marihuana, or 1,000 or more marihuana plants regardless of weight * * * shall be sentenced to a term of imprisonment which may not be less than 10 years." By its terms, the

statutory mandatory minimum sentence is applicable to any defendant who commits a violation of Section 841(a) "involving" at least 1000 marijuana plants; nothing in the text suggests that application of the statutory one-plant/one-kilogram equivalency provision is limited to cases in which the government has seized live marijuana plants from the defendant. See *United States* v. *Shields*, 87 F.3d 1194, 1197 (11th Cir. 1996); *Silvers*, 84 F.3d at 1325-1326; *United States* v. *Wegner*, 46 F.3d 924, 928 (9th Cir. 1995); cf. *United States* v. *Wilson*, 49 F.3d 406, 410 (8th Cir.) (reaching same conclusion under Guidelines § 2D1.1(c)), cert. denied, 116 S. Ct. 384 (1995).

It is well settled, moreover, that as a general matter even where no drugs are actually seized, the government may prove the type and quantity of drugs attributable to a defendant through other evidence. See Sentencing Guidelines § 2D1.1, application note 12 ("Where there is no drug seizure * * * , the court shall approximate the quantity of the controlled substance."); Sentencing Guidelines § 6A1.3(a) (in making factual determinations related to sentencing, court may consider all "relevant information" that has "sufficient indicia of reliability to support its probable accuracy"). Nothing in Section 841(b)(1)(A)(vii) suggests that Congress intended to create a special exception to that rule for those convicted of possessing marijuana plants. See *Wegner*, 46 F.3d at 928 (statute does not "restrict the nature of the evidence which must underlie the sentence or require the conversion of evidence of plants into dry marijuana"); accord *Silvers*, 84 F.3d at 1327.

Finally, the plain import of the text is consistent with Congress's intention through Section 841(b)(1)(A)(vii) to punish large-scale growers of

marijuana plants more severely than small-scale growers or those involved in later steps of the distribution chain. See, *e.g.*, *United States* v. *Murphy*, 979 F.2d 287, 290 (2d Cir. 1992); *United States* v. *Haynes*, 969 F.2d 569, 573 (7th Cir. 1992); *United States* v. *Osburn*, 955 F.2d 1500, 1508 (11th Cir.), cert. denied, 506 U.S. 878 (1992). The evidence in this case established that petitioner helped cultivate more than 1000 marijuana plants. He prepared the fields, tended the plants, and harvested the leaves. Under any ordinary understanding of the term, petitioner's offense "involved" marijuana plants, and his sentence was therefore properly calculated based on the number of marijuana plants attributable to him. See *Wegner*, 46 F.3d at 928; *Haynes*, 969 F.2d at 573.

2. Contrary to petitioner's argument (Pet. 7-11), there is no conflict between the court of appeals' decision and decisions of the Second and Sixth Circuits warranting this Court's review. Although the Sixth Circuit stated in *United States* v. *Stevens*, 25 F.3d 318 (1994), that the one-plant/one-kilogram equivalency provision was applicable only to "live marijuana plants found," *id.* at 323, the defendant in that case had purchased already-processed marijuana for resale; there was no evidence that he had any involvement in growing, harvesting, or processing the plants. *Id.* at 319-320. The Sixth Circuit has since made clear that a defendant convicted of manufacturing marijuana plants is properly sentenced under the equivalency provision "based on the number of marijuana plants he had grown, even though at the time of his arrest the plants had been 'harvested.'" *Oliver* v. *United States*, 90 F.3d 177, 178 (1996). See also *id.* at 179 ("[S]o long as the government can prove * * * that a particular grower

charged with manufacture grew a particular plant, sentencing should be based on the equivalency ratio in the sentencing guidelines.").

In *United States* v. *Blume*, 967 F.2d 45 (2d Cir. 1992), the court ruled that, under Section 841(b)(1)(A)(vii), sentencing courts are to "measure live marijuana by the number of plants and dry leaf marijuana by weight." 967 F.2d at 49 (internal quotation omitted). The Second Circuit has retreated from that position, however. In *United States* v. *Murphy*, 979 F.2d 287 (1992), the defendant (a marijuana grower) contended that the mandatory minimum sentencing provision violates due process because it irrationally treats a grower "who is arrested immediately prior to harvesting * * * more harshly than one arrested after the marijuana is harvested." *Id.* at 290. The court of appeals agreed that that would be anomalous. *Ibid.* "The solution," the court reasoned, "is to increase the harvester's sentence rather than to decrease the grower's sentence." *Ibid.* Thus, it held, "if there is proof that a defendant has recently harvested * * * marijuana plants, and the marijuana in his or her possession is the fruit of those poisonous plants, * * * that individual should be sentenced as if the plants had not yet been harvested." *Ibid.* In light of its holding in *Murphy*, the Second Circuit would likely reach the same result as the court below in the circumstances presented by this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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